No. 97-29

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a three-judge district court for the District of Columbia has jurisdiction under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to hear and decide a declaratory judgment action brought by a jurisdiction covered under the Act solely for the purpose of determining whether potential action authorized by a state enabling statute would be a change with respect to voting covered by the Act requiring preclearance.

2. Whether appellant's claim, that potential action by state education officials to impose sanctions on local school districts authorized by a state enabling statute would not require preclearance under Section 5, presents a ripe controversy, when appellant has taken no action under the enabling statute.

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OPINION BELOW

The amended opinion and order of the three-judge district court (J.S. App. 13a-23a, 24a-25a) are unreported.

JURISDICTION

The initial judgment of the district court was entered on March 5, 1997, and an amended judgment was entered on March 17, 1997. A notice of appeal was filed on April 23, 1997 (J.S. App. 26a-27a), and a supplemental notice of appeal was filed on May 12, 1997 (J.S. App. 28a-29a). The jurisdictional statement was filed on June 23, 1997. This Court noted probable jurisdiction on September 29, 1997. The jurisdiction of this Court rests on 42 U.S.C. 1973c.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. 1973c, provides that, whenever a jurisdiction covered under the Act "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the date of coverage, the jurisdiction may not enforce the new practice "unless and until" it obtains a declaratory judgment from the United States District Court for the District of Columbia that the new practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." Alternatively, the covered jurisdiction may enforce the new practice without resort to the judicial declaratory-judgment proceeding if it submits the new practice to the Attorney General for review and receives no objection to the practice from the Attorney General within 60 days thereafter, or if the Attorney General makes clear that she does not object to the practice. *Ibid.*; see generally *Clark* v. *Roemer*, 500 U.S. 646, 648-649 (1991). The process of seeking a declaratory judgment from the United States District Court for the District of Columbia is commonly referred to as "judicial preclearance"; the submission of a change to the Attorney General for review is commonly referred to as "administrative preclearance." See *ibid.* The Act does not require a covered jurisdiction to submit a new enactment to the Attorney General for preclearance; "[t]he provision for submission to the Attorney General merely gives the covered [jurisdiction] a rapid method of rendering a new state election

law enforceable." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 549 (1969).

2. Texas is a covered jurisdiction under Section 5. See 28 C.F.R. Pt. 51 App. Local school boards in Texas are elected by the voters of the district. Tex. Educ. Code Ann. §§ 11.051-11.063 (West 1996 & Supp. 1998); J.S. App. 89a. In 1993, the Texas legislature enacted provisions designed to make local school boards accountable to the State for their performance and that of their students. See App. Br. 4.[1] The legislature authorized the State Commissioner of Education (Commissioner), in certain circumstances, to assume authority over local school districts by, among other things, appointing a management team to oversee the operations of a school system. J.A. 22-23. Under the 1993 legislation, a management team appointed by the Commissioner was empowered to "direct an action to be taken by the principal of a campus, the superintendent of the district, or the board of trustees of the district," and to "approve or disapprove any action" by a principal, superintendent, or board of trustees. J.A. 23.

In 1995, the Commissioner appointed a management team to oversee the operations of the Somerset Independent School District. See J.A. 24; *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (J.A. 20-30), dismissed as moot (W.D. Tex. Jan. 16, 1996) (J.A. 42-49). The Commissioner gave that team "broad authority," including power to veto actions of the elected Board. J.A. 27. Neither the Texas Education Agency nor the Commissioner gave "any indication of

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[1] "App. Br." refers to the brief for appellant; "Amici Br." refers to the brief for amici Washington Legal Foundation, *et al.*

how long the management team [might] be in place." J.A. 25.

Texas did not submit either the 1993 legislation or the 1995 appointment of the management team for the Somerset school district to the Attorney General for preclearance, having taken the position that neither the enactment of the legislation nor its implementation was a change affecting voting that would require preclearance. J.A. 22. Nor, for the same reason, did Texas seek judicial preclearance in the United States District Court for the District of Columbia. Private plaintiffs and the United States brought suit under Section 5 in a local three-judge district court for the Western District of Texas to enjoin the appointment of the management team to oversee the operations of the Somerset school district, contending that the appointment was covered by Section 5 but had not been judicially or administratively precleared in conformity with the Act.

On May 11, 1995, the district court in Texas entered a preliminary injunction against the implementation of the state officials' plan for a management team to oversee the operations of the Somerset school district. See J.A. 20-30. In explaining that the plaintiffs were likely to succeed on the merits, the court stressed that the 1993 legislation permitted the State to "appoint a management team that can completely usurp the function of the Somerset I.S.D. Board of Trustees." J.A. 27. Noting that this Court had already concluded that "the replacement of an elected office with an appointed one is a change subject to preclearance under § 5," *ibid.* (citing *Allen*, 393 U.S. at 569-570), the district court reasoned that the appointment of a management team to oversee the operations of a local school district may well "rise to

the level of a *de facto* replacement of an elective office with an appointive one" and thus require preclearance under Section 5, see J.A. 27-28 (quoting *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992)).

3. Shortly thereafter, the Texas legislature repealed the 1993 authorizing statute, and enacted in its stead the authorizing provisions that are now at issue in this case. (The *Casias* litigation was then dismissed as moot, J.A. 42-49.) The newly enacted Chapter 39 of the Texas Education Code gives the Commissioner authority to impose a variety of sanctions, in increasing order of severity, on local school districts. See Tex. Educ. Code Ann. § 39.131(a) (West 1996); J.S. App. 90a-91a.

The first six sanctions made available to the Commissioner include mild interventions such as ordering preparation of a student achievement improvement plan (§ 39.131(a)(3)) and arranging an on-site investigation of the school district (§ 39.131(a)(5)). Those provisions do not fundamentally affect the authority of the elected school board and therefore clearly do not affect "voting" within the meaning of the Voting Rights Act. Two provisions of Chapter 39, by contrast, do affect voting (and appellant does not contend otherwise). The first of those, § 39.131(a)(9), authorizes the Commissioner to "appoint a board of managers * * * to exercise the powers and duties of the board of trustees" of a school district. The second, § 39.131(a)(10), provides that the Commissioner may annex the school district to one or more adjoining districts or ask the State Board of Education to revoke a school district's home-rule charter. See J.S. App. 91a.

Chapter 39 makes two further kinds of sanctions available to the Commissioner; the potential effects of

those sanctions are central to the dispute in this case. Section 39.131(a)(7) permits the Commissioner to appoint a master to "oversee" the operations of a school district. Section 39.131(a)(8) authorizes the Commissioner to appoint a management team to "direct" the operations in areas of unacceptable performance. See J.S. App. 90a-91a.

When the Commissioner assumes authority under subsections (7) and (8), he must "clearly define the powers and duties of a master or management team" appointed pursuant to these provisions. § 39.131(e). As was the case under the 1993 legislation, Chapter 39 states that a master or management team may "direct an action to be taken" by a principal, superintendent, or board of trustees (§ 39.131(e)(1)), and may "approve or disapprove any action" by those officials (§ 39.131(e)(2)). Thus, a master or management team could, at least if so authorized by the Commissioner, annul policies of the elected school board in areas such as curriculum and personnel. The Commissioner may not, however, give the master or management team the power to take any action concerning a district election, to change the number of members or method of selecting the board, to set a tax rate, or to adopt a budget different from the one previously adopted by the elected board. § 39.131(e)(4)-(6); see J.S. App. 91a-92a.

The Commissioner must review the need for the master or management team at least every 90 days, and must remove the master or management team "unless [he] determines that continued appointment is necessary for effective governance of the district or delivery of instructional services." § 39.131(e). Should the Commissioner conclude that such a continued appointment is necessary, however, no

maximum time limit is imposed on the tenure of a master or management team.

The design of Chapter 39, and the policy of the state agency implementing it, are that more limited interventions shall be attempted before the appointment of a master or management team is considered. See App. Br. 9 ("[State] policy requires first the imposition of sanctions that do not include the appointment of a master or management team."). In fact, "most interventions begin and end" with sanctions that do not involve the assumption of direct authority over a school district by the Commissioner, through a master or management team. *Id.* at 9-10.

4. Although the State initially maintained that none of the sanctions available under Section 39.131, except Section 39.131(a)(10), affects voting within the meaning of Section 5, the State submitted all of Chapter 39 to the Attorney General for preclearance on June 12, 1995. J.S. App. 30a-34a. On August 14, 1995, the Assistant Attorney General[2] requested further information with respect to the roles of various state bodies in "the decision to investigate and/or replace an elected or consolidated school board with an appointed master, team, board, etc." J.A. 39. While taking issue with the Assistant Attorney General's "characterization of sanctions under section 39.131 as a 'replacement' of an elected school board" (J.S. App. 96a), and emphasizing limits that Chapter 39 places on the authority of masters and management teams (*id.* at 99a), the State explained that "[t]he actual authority granting a specific master or team * * * is set by

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[2] The authority for determinations under Section 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. 51.3.

the Commissioner at the time of appointment depending on the needs of the district" (*ibid.*).

5. On December 11, 1995, the Assistant Attorney General concluded that sanctions under Section 39.131(a)(1)-(6) do not affect voting and therefore do not require preclearance. J.S. App. 36a. He also precleared Section 39.131(a)(7)-(10) insofar as those provisions were "enabling in nature." *Ibid.*[3] The Assistant Attorney General cautioned, however, that, with regard to those provisions, "under certain foreseeable circumstances their implementation may result in a violation of Section 5." *Ibid.* In particular, he noted:

> [I]nsofar as [Chapter 39] authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers; annex one school district to another; and revoke the charter of a home-rule school district, it clearly contains voting changes. In particular, [Chapter 39] retains the exact language [that the district court] in *Casias* v. *Moses* * * * found "could result in the replacement of the elected Board with the appointed management team."

Id. at 36a-37a (citations omitted).

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[3] Under the Attorney General's procedures for preclearance submissions under Section 5, when legislation enables a State to institute a voting change in the future, "the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled * * * unless that implementation is explicitly included and described in the submission of such parent legislation." 28 C.F.R. 51.15(a).

The Assistant Attorney General acknowledged that the 90-day reevaluation requirement and the restrictions on powers over elections, taxes, and budgets had narrowed the scope of the mandate that the Commissioner could give any master or management team. J.S. App. 37a. He concluded nonetheless that the remaining powers made available to a master or management team under Chapter 39 "still potentially allow[] for the 'take-over' of a school board such that the board cannot perform the functions that are its 'reason for being.'" *Ibid.* (citation omitted). He therefore stated that preclearance would be required if the State actually sought to administer "any voting change made pursuant to Chapter 39—including but not limited to the replacement, *de facto* or otherwise, of an elected school board by an appointed master[,] management team, or board of managers, the annexation of one school district to another, and the revocation of a home-rule school district's charter." *Id.* at 37a-38a.

6. On June 7, 1996, appellant filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that Section 5 does not apply to the sanctions authorized by Section 39.131(a)(7) and (8), because those sanctions are not changes with respect to voting. J.A. 13-14. In addition, appellant contended, the sanction provisions in question do not require preclearance because they are consistent with conditions attached to grants of federal financial assistance to education authorities, which authorize and require the imposition of sanctions to ensure the accountability of local education authorities. J.A. 13. Appellant alleged that the district court had jurisdiction under Section 5 and under the general federal-question statute, 28 U.S.C. 1331.

J.A. 6. Appellant requested that a three-judge court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c. J.A. 7. In its answer, the United States did not contest the allegation that jurisdiction in the district court was based on Section 5, nor did it object to the convening of a three-judge court to hear and decide the matter. See J.A. 15.

The district court convened a three-judge panel. Appellant moved for summary judgment; the United States opposed that motion. The United States also moved to dismiss the case as unripe and, in the alternative, moved for judgment on the pleadings on the basis that, absent more significant limitations upon the authority of masters and management teams, the disputed provisions constitute voting changes subject to the requirement of preclearance under Section 5.

7. The district court granted the United States' motion to dismiss on ripeness grounds. J.S. App. 13a-23a. The court initially observed that this action "does not fit neatly into the statutory framework of section 5," for it "does not fall clearly" into any category of suit contemplated by Section 5. *Id.* at 16a. The court noted that this is not a suit by a covered jurisdiction for preclearance of the pertinent legislation, an injunctive action brought by voters to block implementation of an unprecleared change, or an enforcement action against unprecleared changes brought by the United States. *Ibid.* Rather, appellant "seeks a blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." *Id.* at 16a-17a. "The statutory basis for jurisdiction over such an action is unclear," stated the court, and "[e]ven if a statutory basis for jurisdiction exists,

however, it is unclear whether such an action would involve a 'case or controversy' sufficient to satisfy the requirement of Article III of the Constitution." *Id.* at 17a.

The court did not find it necessary to resolve those doubts about its statutory and constitutional jurisdiction, for it concluded that this suit was unripe for adjudication, in both the constitutional and the prudential sense. With respect to the Article III component of ripeness, the court held that Article III's requirement of an imminent injury to the party invoking the jurisdiction of the federal courts was not satisfied by appellant's contention that it had an interest in preventing the diminution of the quality of education available to Texas schoolchildren, and in moving promptly and efficiently to safeguard that education. J.S. App. 17a-18a. The court declined to assume that, if the State ever found it necessary to appoint a master or management team, the Attorney General and the courts would not handle preclearance requests expeditiously. Any assumptions to the contrary "are, simply, too speculative to sustain a claim." *Id.* at 18a.

With respect to the prudential aspects of the ripeness doctrine, the court concluded that the issues presented were not ripe for judicial resolution under the two-prong analytical framework set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). First, the court held, this case does not present a "purely legal question[]" that would be "presumptively suitable for judicial review." J.S. App. 18a. Because the sanctions available to the Commissioner "are broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances[,] * * * the actual contours of each appoint-

ment order will be determinative of whether an elected board is displaced or its powers in any way diminished." *Id.* at 19a (internal quotation marks and brackets omitted). "The broad discretion accorded the Commissioner under the statute demonstrates the necessity of examining the full factual context in which she is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms." *Ibid.*[4]

The district court held further that withholding judicial decision at this stage would not "cause undue hardship" to appellant. J.S. App. 21a. Whereas appellant alleged that requiring preclearance each time the Commissioner places a management team or master in a school district would prevent it from moving promptly to protect education, the court found that allegation to be "so vague that it really amounts only to a complaint that this issue remains unresolved." *Ibid.* (internal quotation marks omitted). The court was "unwilling to assume that administrative or judicial preclearance will prove so unwieldy as to deny Texas a meaningful opportunity to expeditiously

[4] The court distinguished *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), in which a three-judge district court held that legislation abolishing an elected water district and creating a new appointed body in its stead required preclearance, even though the new appointed authority was not yet functional. In that case, the court concluded that any implementation of the statute would affect voting, and therefore the statute required preclearance regardless of the precise details of its implementation. "The statute at issue in this case, by contrast, gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished." J.S. App. 20a.

implement its statutory scheme." *Ibid.* It also observed that, in Section 5, Congress itself had "struck the balance in favor of preclearance to protect voting interest[s] over school district changes to improve the education process." *Ibid.*

SUMMARY OF ARGUMENT

I. The district court lacked statutory subject-matter jurisdiction over this case. The Voting Rights Act of 1965 sets forth specific avenues for a judicial determination whether a change in state law is a change with respect to voting that requires preclearance. This case, however, does not fall within any of the categories of suits that are within the Act's design. In particular, this case is not a judicial preclearance action brought by a covered jurisdiction for a determination that a change does not have a discriminatory purpose or retrogressive effect. Rather, appellant has brought its declaratory judgment action solely for a determination that its proposed, possible changes would not be changes with respect to voting. In effect, appellant has sought a declaratory judgment to the effect that it does not need to seek a declaratory judgment under Section 5 for preclearance of its changes. That kind of suit does not fall within the jurisdiction granted to the United States District Court for the District of Columbia for actions under Section 5. The district court might, in a properly presented action for judicial preclearance of Section 39.131(a)(7) and (8), decide that those provisions are not covered by Section 5, but it would not be required to decide the case on that basis; and because appellant has not brought and could not bring an action for judicial preclearance of a hypothetical future implementation of those provisions, there is no

basis in Section 5 for a judicial determination that such a future implementation would not affect voting.

II. The district court correctly dismissed this case as unripe. The case fails to meet the core Article III requirement of a ripe controversy because appellant has not pointed to any definite plan now or in the immediate future to appoint a master or management team for any particular school district in Texas. Especially because appellant's policy is to use less intrusive sanctions before more intrusive ones (such as the appointment of a master or management team), it remains entirely speculative whether appellant will ever find it necessary to deploy those more intrusive measures. The courts may never be called upon to decide whether the Commissioner of Education's appointment of a master or management team would be a *de facto* replacement of an elected school board requiring preclearance under Section 5.

Prudential considerations also militate against judicial decision of the coverage issue at this time. The powers that may be vested in a master or management team are subject to the Commissioner's broad discretion, and may vary widely from case to case. The answer to the question whether such an appointment would amount to a *de facto* replacement will turn on the precise nature of the powers granted to an appointed official and concomitantly removed from an elected board. Therefore, the question of coverage is not one that the district court can resolve as a pure issue of law, but rather requires a concrete factual context for an informed decision. Nor would appellant suffer undue hardship if judicial resolution of the question of coverage were postponed until such a concrete context arises. Should the Commissioner seek to appoint a master or management team, the

State can request expedited consideration from the Attorney General or from the district court.

Federal education statutes relied on by appellant provide no basis for overturning the district court's ripeness decision. Notwithstanding those statutes, appellant still does not have a present, actual plan to impose sanctions on a local school district, and postponing consideration of the legal issue would not cause it hardship; therefore, it has no ripe claim. Moreover, appellant's contention on the merits that those statutes exempt it from coverage under Section 5 is foreclosed by *Young* v. *Fordice*, 117 S. Ct. 1228 (1997).

III. Should the Court conclude that a justiciable controversy is present in this case, it should remand the case to the district court for further proceedings on the question of coverage under Section 5, rather than address that issue in the first instance. Appellant did not present the question of coverage in its jurisdictional statement, the district court made no findings of fact or conclusions of law on that issue, and discovery may be necessary for a proper presentation of the question to the district court.

ARGUMENT

I. THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA LACKS STATUTORY JURISDICTION OVER A DECLARATORY JUDGMENT ACTION BROUGHT BY A COVERED JURISDICTION SOLELY FOR A DECLARATION THAT A SUBMITTED CHANGE DOES NOT AFFECT VOTING

1. The gravamen of appellant's complaint in its declaratory judgment action is that the potential future appointment of a master or management team by the Texas Commissioner of Education for a local school district would not be a new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," for which preclearance would be required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The Act sets forth four mechanisms by which a determination can be made that a particular covered jurisdiction's action is or is not a change with respect to voting.

First, under Section 5, the jurisdiction may submit the proposed change to the Attorney General for preclearance. The Attorney General may conclude that the proposed change does not affect voting, and if the Attorney General makes no objection to the proposed change within 60 days or indicates within that time that no objection will be made, then further litigation on coverage is precluded and the change may be freely implemented. See *Morris* v. *Gressette*, 432 U.S. 491, 502-505 (1977).

Second, if and when a covered jurisdiction intends to implement a change, it may request a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. In deciding such an action, the district court has authority to decide whether a proposed change affects voting. See *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994) (three-judge court); see also *City of Lockhart* v. *United States*, 460 U.S. 125, 131-132 (1983) (deciding whether new practice was a change from previous practice and thus covered by Section 5). If the change does not affect voting, then it is not a "practice" or "procedure" that could "deny[] or abridg[e] the right to vote" within the meaning of Section 5.

Third, a covered jurisdiction that believes that a change does not affect voting may simply implement it. If the Attorney General believes that the change does affect voting and should have been precleared under Section 5, the Act expressly provides that she may institute an enforcement action in a local three-judge district court to enjoin its implementation until preclearance is completed. See 42 U.S.C. 1973j(d) and (f).[5] In such an enforcement action, the district court has authority to decide whether or not the implemented change affects voting and therefore requires preclearance (and this Court on appeal has the same authority). See *Georgia* v. *United States*, 411 U.S. 526, 531-535 (1973). If the courts conclude that the

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[5] Section 12(d) of the Act, 42 U.S.C. 1973j(d), provides: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by [Section 5] * * * the Attorney General may institute for the United States * * * an action for preventive relief." Section 12(f) provides that the district courts have jurisdiction over such actions. 42 U.S.C. 1973j(f).

change does not affect voting, then preclearance is not required, and the Attorney General's enforcement action should be dismissed.

Private plaintiffs may also pursue a similar, fourth avenue of review that is available under Section 5 by necessary implication. Once a covered jurisdiction implements a proposed change, private plaintiffs may also sue for injunctive relief in a local three-judge district court if they believe that the change required preclearance. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554-557 (1969). In such a private action, the district court (and this Court on direct appeal) may decide whether or not the change affects voting and requires preclearance. See, *e.g.*, *Presley* v. *Etowah County Comm'n*, 502 U.S. 491 (1992); *Perkins* v. *Matthews*, 400 U.S. 379, 387-395 (1971); *Allen*, 393 U.S. at 563-571.

2. The Voting Rights Act therefore provides specific and carefully focused mechanisms for resolution of the question of coverage. But as the court below noted (J.S. App. 16a), this case "does not fit neatly into the statutory framework" of the Act and "does not fall clearly into any of the[] three categories" of lawsuits contemplated by the Act. In particular, appellant's declaratory judgment action is not a preclearance action that falls within the jurisdiction of the district court for the District of Columbia expressly established by Section 5.[6] Nor is there in Section 5 a

[6] It is appropriate to view Section 5's limited grant of authority to the District of Columbia district court to hear preclearance actions as jurisdictional. When this Court upheld the related and similar grant of authority to the District of Columbia district court in Section 4(a) of the Act, 42 U.S.C. 1973b(a), to hear and decide declaratory judgment actions brought by covered jurisdictions to terminate the suspension of voting tests and devices, it stated that "Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966). The exclusive jurisdiction of the District of Columbia district court to hear declaratory judgment actions under both Sections 4 and 5 is based on the same provision in Section 14(b), 42 U.S.C. 1973*l*(b) ("No court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue any declaratory judgment pursuant to [Section 4 or 5]."). The Court has also stated that "only the District Court for the District of Columbia has jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race," in holding that other district courts may not decide substantive issues arising under Section 5, but may decide only whether a change is covered by Section 5 and was precleared. *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 646 (1977) (per curiam).

As we noted above (p. 10, *supra*), the United States did not, in the district court, contest that the court had jurisdiction under Section 5 (although we did argue that the case was not ripe). Nevertheless, because subject-matter jurisdiction may not be conferred on a federal court by consent, and because appellant raised the issue of the district court's statutory jurisdiction as a question presented in its jurisdictional statement (see J.S. i), this Court may at this stage decide whether the district court had statutory subject-matter jurisdiction over this case.

waiver of the United States' sovereign immunity for the kind of action brought by appellant in this case. The central authority of the District of Columbia district court in judicial preclearance actions is to determine whether a proposed change is retrogressive or is motivated by a discriminatory purpose. See *Reno* v. *Bossier Parish School Bd.*, 117 S. Ct. 1491, 1497-1501 (1997); *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). Appellant, however, has not sought a

determination from the district court that its proposed change is neither retrogressive nor invidiously motivated. Rather, it has sought a "blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." J.S. App. 16a-17a.

It is true that, when the District of Columbia district court hears a traditional judicial preclearance action in which a ripe controversy is presented, that court may decide the case in favor of the covered jurisdiction if it concludes that preclearance is not required at all because the proposed change does not affect voting. See pp. 16-17, *supra*. To hold otherwise would be to impose a pointless requirement on a covered jurisdiction. Because "changes subject to § 5 pertain only to voting," *Presley*, 502 U.S. at 502, the district court, when hearing a preclearance action, would not be justified in denying relief to the covered jurisdiction from the strictures of Section 5 simply because Section 5 was not applicable *at all*. In that situation, however, the district court has statutory authority under Section 5 to hear and decide the case. The fact that the district court may grant relief on that basis when it does have jurisdiction over a preclearance action does not imply that it also has jurisdiction to decide declaratory judgment actions brought to raise *only* the question of coverage, and when no question of preclearance is presented.

Moreover, although a covered jurisdiction might bring a preclearance action in the District of Columbia district court and request relief on the alternative basis that legislation or its implementation is not covered by Section 5, the district court would not be obligated to rule on that basis; it might rule in favor of the covered jurisdiction on the ground that the

legislation does not have discriminatory purpose and will not have a retrogressive effect. In such a case, the covered jurisdiction would be a prevailing party in the district court and could not appeal to this Court from the declaratory judgment in its favor merely on the ground that it would have preferred that the lower court rule in its favor on another rationale with broader implications for hypothetical future conduct. See *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939) (per curiam).

Thus, instead of submitting Section 39.131(a)(7) and (8) to the Attorney General for administrative preclearance (or if the Attorney General had denied preclearance), appellant could have brought a judicial preclearance action under Section 5, asking the district court to preclear those provisions and arguing, *inter alia*, that they are not voting changes. The district court, however, might have precleared those provisions on narrower grounds as enabling legislation that does not itself have a prohibited purpose or effect, just as the Attorney General precleared them as enabling legislation (see p. 8, *supra*). Appellant, moreover, could not have asked the district court to preclear any hypothetical actual *implementation* of Section 39.131(a)(7) or (8) under Section 5, because the State does not yet "seek to administer" those provisions (and indeed appellant did not request preclearance of their implementation under Section 5). It follows that, because appellant could not yet obtain substantive judicial preclearance of any actual implementation of a particular sanction under Section 39.131(a)(7) or (8), there is no statutory basis under Section 5 for the District of Columbia district court

to entertain a suit merely to provide appellant with a ruling that such an implementation would not be a voting change covered by Section 5.

Nor can the district court's authority to decide this case be predicated on another express statutory source of federal jurisdiction, such as 28 U.S.C. 1331, the general federal-question statute, or 28 U.S.C 1343(a)(4), providing for jurisdiction to grant equitable relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." To proceed against the United States under either statute, appellant would also have to point to some applicable express waiver of sovereign immunity, such as the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* This Court has already heid, however, that the Attorney General's preclearance decisions are not subject to judicial review under the APA, *Morris* v. *Gressette*, 432 U.S. at 506, and in any event appellant has never suggested that this case was brought as an APA action.[7]

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[7] Appellant's complaint alleged jurisdiction under Section 1331, but not Section 1343, and did not refer to the APA at all. J.A. 6. In its jurisdictional statement, appellant presented only the question of jurisdiction under Section 5. J.S. i. In its brief on the merits, appellant has not addressed the question of statutory jurisdiction at all.

In addition, Section 1343 limits federal jurisdiction to civil rights actions brought by "any person." It is doubtful that a political entity, such as appellant, is a "person" within the meaning of Section 1343. See *United States* v. *City of Jackson*, 318 F.2d 1, 8 (United States not a "person" under Section 1343), on denial of reh'g, 320 F.2d 870 (5th Cir. 1963); *Buda* v. *Saxbe*, 406 F. Supp. 399, 403 (E.D. Tenn. 1975) (State not a "person" under Section 1343). Section 1343 and its substantive counterpart, 42 U.S.C. 1983, were enacted to allow the enforcement by "private parties" of their civil rights against

Finally, there is nothing in the structure or purpose of the Voting Rights Act to indicate that Congress *implied* authority for the District of Columbia district court to decide actions of this nature against the United States. This Court has found that Congress implied for private plaintiffs an avenue of relief from voting changes that have not been precleared in conformity with Section 5. *Allen*, 393 U.S. at 554-557. That situation, however, did not involve the need for any waiver of sovereign immunity by the United States, since the implied cause of action did not run against the United States. See *id.* at 558-559. A waiver of the federal government's sovereign immunity, by contrast, must be unequivocally expressed in the statutory text, and must extend unambiguously to the specific kind of claim that is pressed against the United States. See *Lane* v. *Peña*, 116 S. Ct. 2092, 2096-2097 (1996). There is no express provision in the Act permitting covered jurisdictions to sue the United States solely for a declaration that a proposed change is not covered by the Act.

Furthermore, the considerations that persuaded the Court in *Allen* to find an implied avenue of relief for private plaintiffs against covered jurisdictions are not applicable here. The Court in *Allen* concluded that Congress would not have wanted private persons to be completely dependent on the Attorney General's limited resources for protection from unprecleared changes, and that "[t]he guarantee of § 5 that no

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governmental actors, see *Moor* v. *County of Alameda*, 411 U.S. 693, 699 (1973), but political entities such as appellant have no such civil rights against the United States. See *South Carolina* v. *Katzenbach*, 383 U.S. at 323-324 ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States).

person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557. By contrast, a covered jurisdiction that desires to implement a proposed change has effective remedies; it may submit the change to the Attorney General for review, it may bring a traditional judicial preclearance action, or it may simply implement the change and raise as a defense to any enforcement action the argument that the change is not covered by Section 5. Accordingly, the district court lacked statutory jurisdiction under the Voting Rights Act to decide this case.[8]

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[8] Although the district court lacked jurisdiction over this action, this Court has appellate jurisdiction over the State's appeal from the district court's judgment of dismissal. Section 5 provides that "any appeal" from a decision of a three-judge district court convened to decide a case under Section 5 shall lie to the Supreme Court. 42 U.S.C. 1973c. This Court has held that the words "any appeal" in Section 5 are to be given a broad construction. See *NAACP* v. *New York*, 413 U.S. 345, 353 (1973). Thus, even if the three-judge court was not properly convened in this case (because it lacked subject-matter jurisdiction over appellant's complaint), this Court has statutory authority to hear and decide the State's direct appeal from that court's judgment of dismissal on ripeness grounds. That point contrasts with the Court's much more limited appellate jurisdiction under 28 U.S.C. 1253; under that provision, this Court may hear and decide appeals only from orders of district courts granting or denying an injunction "in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Cf. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974) (concluding that Court lacked jurisdiction to hear direct appeal from three-judge court's order dismissing case for lack of standing, and remanding for entry of fresh order to be appealed to court of appeals).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE QUESTION OF THE APPLICABILITY OF SECTION 5 TO POTENTIAL FUTURE IMPLEMENTATIONS OF SECTION 39.131(a) (7) OR (8) IS NOT RIPE FOR JUDICIAL REVIEW

Even if the district court had statutory subject-matter jurisdiction under Section 5, it nonetheless correctly dismissed this case. In the absence of any definitive plan by state authorities to appoint a master or management team to any particular local school district now or in the future, the district court correctly ruled that the question of the applicability of Section 5 to the State Education Commissioner's potential invocation of such sanctions is not ripe for judicial review.

A. The State's Request For A Declaratory Judgment Does Not Satisfy The Constitutional Requirement Of A Ripe Controversy

1. Chapter 39 of the Texas Education Code empowers the Texas Commissioner of Education to impose a number of sanctions on school districts, in ascending order of severity and intrusiveness. The Commissioner may, for example, issue a public notice of a school district's deficiency, order the preparation of a student achievement plan by a school district, appoint an agency monitor to "participate in" the activities of a school board, appoint (as pertinent here) a master to "oversee" the operations of a district or a management team to "direct" the operations of a district, or

appoint a board of managers to "exercise the powers" of the school board. See Tex. Educ. Code Ann. § 39.131(a) (West 1996). The available powers afford the Commissioner wide discretion in choosing a sanction appropriate to the degree of deficiency in any particular school board, and it is not contested that the Commissioner has authority to use a less intrusive sanction (such as appointing a monitor) before deploying a more drastic one involving the removal of authority from a local school board (such as appointing a master or management team). Indeed, appellant acknowledges (Br. 9) that the policy of the state education agency is to use the less intrusive interventions, such that the more intrusive ones may never become necessary. In the event that a school district's deficiencies justify intervention under Chapter 39, the exercise of less intrusive powers by the Commissioner may resolve the problems. It is therefore not certain that the Commissioner will ever find it necessary to appoint a master or management team under Chapter 39 for any school district, and appellant has not pointed to any specific situation in which even the *potential* application of Section 39.131(a)(7) or (8) is currently foreseen.

Because the State may never find it necessary to appoint a master to oversee the operations of a school board or to appoint a management team to direct those operations, the State's request for a declaratory ruling that such an appointment would not implicate Section 5 is not ripe for review, in the constitutional sense. This case is similar to *Renne* v. *Geary*, 501 U.S. 312 (1991), where the Court ruled that a ripe controversy was not presented by political parties' constitutional challenge to a state statute prohibiting political party endorsements of candidates for nonpar-

tisan offices. As was the case in *Renne*, where the Court "discern[ed] no ripe controversy in the allegations that [the political parties] desire to endorse candidates in future elections" because the parties had not "allege[d] an intention to endorse any particuar candidate," *id.* at 321, here appellant has not alleged any intention to impose the relevant sanctions in any particular case. And as in *Renne*, where the Court stressed its uncertainty about "the nature of the endorsement, how it would be publicized, or the precise language [the State] might delete from the voter pamphlet," *id.* at 322, here it remains entirely uncertain what powers the Commissioner might vest in a master or management team, and concomitantly what powers might be removed from an elected school board.

In effect, appellant has asked for an advisory opinion that, *if* the Commissioner decided at some point to appoint a master or management team, that appointment would not require preclearance under Section 5. Cf. *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954) ("That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."). But appellant has given no indication that the Commissioner intends imminently to appoint a master or management team to any particular school district. There is "no factual record of an actual or imminent application of [state sanctions] sufficient to present the [Section 5] issues in clean-cut and concrete form." *Renne*, 501 U.S. at 321-322 (internal quotation marks omitted); cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947) (justiciable controversy is pres-

ent only when "definite rights appear upon the one side and definite prejudicial interferences upon the other").

Furthermore, the powers that may be conferred on masters and management teams under Section 39.131(a)(7) and (8) are subject to the Commissioner's broad discretion. Those provisions allow appointment of a master to "oversee" the operations of a school district or a management team to "direct" such operations. While such appointments may result in a change affecting voting if broad powers are conferred by the Commissioner, an appointment may also narrowly circumscribe the powers granted to the appointed officials. Thus, postponing consideration of the Section 5 issue "also has the advantage of permitting the state [authorities] further opportunity to construe" the pertinent provisions of Chapter 39 and giving greater clarity to the federal question of the application of Section 5 that would be presented by appointment of a master or management team. Cf. *Renne*, 501 U.S. at 323.

Appellant suggests (Br. 18-20) that the Article III requirement of ripeness is precisely equivalent to that of standing, and that a justiciable controversy is presented because it has standing under *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), and *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993). Appellant's premise that it currently has Article III standing is dubious, in light of the hypothetical and contingent nature of its present claim. In any event, "[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne*, 501 U.S. at 320. "That a proper party is before the court is no answer to the objection that he is there prematurely." *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 79 (1961). The justiciability issue in this case is not whether appellant is a proper party to bring a suit under Section 5; Section 5 itself specifically accords a covered jurisdiction standing to seek preclearance as the entity that has enacted (and may seek to administer) a change. It does not follow, however, that a ripe controversy is present before the State seeks to administer a particular change, such as the imposition of sanctions on an elected school board.

Appellant claims to suffer injury ripe for adjudication because, if it wishes to invoke one of the sanctions authorized by Section 39.131(a)(7) or (8) at some point in the future, it might then suffer from "inability to move promptly and efficiently to safeguard the education of its children" and therefore might then suffer an "unwarranted" federal interference into "routine matters" of governance (App. Br. 19, quoting *Presley*, 502 U.S. at 507). But appellant may never actually invoke the powers authorized by Section 39.131(a)(7) and (8); and even if in the future it does invoke those powers and seek to have the specific implementation precleared, there is no basis for presuming that undue delay will occur. And even if there were such a basis, that would not authorize a federal court to render an advisory opinion about an array of hypothetical potential future events. As the district court pointed out, Article III ripeness is not satisfied when a "case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." J.S. App. 6a; see *Richardson* v. *City & County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (challenge to constitutionality of Hawaii

condemnation statute unripe as long as many conditions precedent to condemnation may never be fulfilled). "A mere hypothetical threat is not enough" to create a ripe controversy. *United Public Workers* v. *Mitchell*, 330 U.S. at 90.

B. Prudential Considerations Also Counsel Against A Decision At This Time On The Question Of Section 5's Coverage Of Future Implementations Of Section 39.131(a)(7) And (8)

Even apart from the fact that appellant's request for a declaratory judgment fails to meet the core constitutional requirement of ripeness, prudential considerations also strongly militate in favor of postponing decision as to whether particular implementations of Section 39.131(a)(7) and (8) might affect voting, as the district court concluded. The question of "prudential ripeness" is "best seen in a twofold aspect, requiring [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). As the district court pointed out (J.S. App. 18a), "[b]oth prongs of the [*Abbott Laboratories*] test must be satisfied before a court may hear a case and render a decision on the merits." Both factors point here to the conclusion that the claim raised by appellant, that Section 5 does not cover certain sanctions that could be imposed on local school districts by the Commissioner, is not ripe for judicial resolution at this time.

1. The district court correctly observed (J.S. App. 18a-19a) that the central question that appellant sought to have adjudicated is not appropriate for judicial resolution at this time because it does not turn on a pure question of law. Appellant contends

that implementation of Section 39.131(a)(7) or (8) would not affect voting within the meaning of Section 5. To prevail in advance of any definite plan to invoke the sanctions authorized by those subsections, appellant would have to persuade the courts that in no circumstance could the appointment of a master or management team affect voting. In our view, that absolute rule cannot be sustained in the abstract, as the State would wish it to be, for under Section 5 jurisprudence much depends on the extent and nature of the powers that will actually be conferred on a master or management team.

Section 39.131(e) provides that "[t]he commissioner shall clearly define the powers and duties of a master or management team appointed to oversee the operations of [a school] district." Tex. Educ. Code Ann. § 39.131(e) (West 1996). The Commissioner therefore has broad discretion to decide which powers shall be exercised by the appointed officials, and which shall be withdrawn from the elected boards. Subject only to the exceptions set forth in Section 39.131(e)(3)-(6), "if directed by the commissioner," the master or management team "may direct an action to be taken by * * * the board of trustees of the district" (§ 39.131(e)(1)) and "may approve or disapprove *any action* of * * * the board of trustees of the district" (§ 39.131(e)(2)) (emphasis added). Appointed under these provisions, appointees might be charged with setting curricula, determining disciplinary policy, hiring and firing teachers, and generally exercising the principal functions of elected school boards. By contrast, the limitations set forth in appointed officials' powers in Section 39.131(e) may or may not represent meaningful limitations on the power of the appointed body. For example, it may be that the elected

board did not have, or had already relinquished, the power to determine the manner by which it would be elected. See, *e.g.*, Tex. Educ. Code § 11.058(f) (West 1996) (if board of independent school district opts for numbered posts, no future board may rescind that action). Under such a circumstance, the limitation in Section 39.131(e)(4), preventing masters and management teams from changing the method of election of the board of trustees, would not meaningfully withhold any power from the appointed entity that was previously held by the elected board. And although appellant argues that the powers granted to a master or management team are temporary, the statute does not actually establish any fixed time limit on the exercise of such powers. The appointment is subject to renewal every 90 days, and there is no limit to the number of times the Commissioner may renew the appointment.

The potential question of coverage under Section 5 is, therefore, whether the appointment of a master or a management team might amount to a *de facto* replacement of an elected school board by an appointed official and might, for that reason, require preclearance. In *Bunton* v. *Patterson*, a companion case to *Allen* v. *State Board of Elections*, this Court held that the replacement of an elected official with an appointed one is a change affecting voting, within the coverage of Section 5. 393 U.S. at 569-570. Although this case does not involve the outright abolition of an elected board and its replacement with an appointive body, the Court has carefully reserved the question "whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a *de facto* replacement of an elective office with an appointive one, within the rule of *Bunton* v. *Patterson*." *Presley*, 502 U.S. at 508.

Appellant correctly points out (Br. 29 & n.25) that this Court has not endorsed the United States' proposed criterion for determining when a shift in governmental authority amounts to a *de facto* replacement—*viz.*, when the change divests an elected body of its "reason for being." Neither, however, has the Court rejected that criterion or set forth a definitive alternative rule. The courts have not yet been presented with many examples of changes alleged to be a *de facto* replacement.[9] Nor is a sufficiently concrete example presented in *this* case. Whether or not there is a "*de facto* replacement" of local authority will depend upon the extent of the elected body's authority and the specifics of the commissioner's mandate in each case. Only when these matters are made clear will the issue be suitable for judicial determination. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-164 (1967) (case did not present pure issue of law because, to determine whether regulation authorizing inspections was valid, court would have to consider FDA's need for enforcement tools "in the context of a specific application of this regulation"); cf. *Abbott Laboratories*, 387 U.S. at 149 (noting that "all parties agree that the issue tendered is a purely legal one"); *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 (1997) (zoning determination ripe for adjudication where agency has no further discretion to exercise over plaintiff's right to use her land).

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[9] *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), was not such a case. See p. 34, n.10, *infra*.

This case is therefore not like the various finality cases relied on by appellant's amici (Br. 9-11), such as *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). In those cases, as in *Abbott Laboratories*—which relied on those three cases, see 387 U.S. at 149-151—a federal agency had issued an order or a regulation announcing a definitive legal rule immediately binding on private parties, and not dependent on particular circumstances for its effect. See *id.* at 151. Similarly, in cases arising under the Voting Rights Act where the legal effect of the change at issue has been clear-cut and nondiscretionary, the courts (including this Court) have not postponed decision. In all of those cases, however, the future allocation of authority did not turn on the discretionary authority of an official or body.[10] Here, by contrast, the contours of the

[10] For example, in *Bunton* v. *Patterson*, private plaintiffs sought a declaratory judgment that a change in the Mississippi Code was covered by Section 5 and could not be enforced without preclearance. Eleven counties that had previously had the option of electing or appointing their superintendents of education were required, by the change, to have superintendents appointed by their board of education. This Court held (393 U.S. at 569-570) that the change in question was covered by Section 5 because, after the change, citizens were "prohibited from electing an officer formerly subject to the approval of the voters" (*id.* at 570). In so holding, the Court recognized that *de jure* replacement of an elected body by an appointed one necessarily affects voting, and that the change might in some contexts have the purpose or effect of abridging the right to vote of those who had thereto been disenfranchised on account of race by other, less subtle means. *Bunton* was followed in *Texas* v. *United States*, 866 F. Supp. at 25-26, in which the district court found that a change in law clearly ousted one elected governing body and substituted another, appointed one. See also *Robinson* v. *Alabama State Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court) (transfer of control of public schools from elected county board of education to city board appointed by city council). Those changes were nondiscretionary ones that affected voting. The statutes in question in *Presley*, *supra*, also did not call for the exercise of official discretion in determining what power would be exercised by what official. One of the changes clearly effected only a reallocation, from individual commissioners to the entire commission, of authority over road building and repair, 502 U.S. at 503-506; the other required an immediate delegation of authority over road improvement to an appointed engineer, *id.* at 506-508. Nothing was left open to any official's or body's discretion for the future reallocation of authority.

authority of a master or management team appointed by the Commissioner remain to be defined.

2. The district court also did not err in concluding (J.S. App. 21a) that appellant would not suffer hardship if judicial resolution of the question of the applicability of Section 5 were postponed until the Commissioner might actually seek to use one of the pertinent powers authorized under Chapter 39. If the Commissioner found it necessary to appoint a master or management team for a school district, then, once the Commissioner had clearly defined the powers of that person or body—as required by Section 39.131(e) of the Education Code—the State could present the appointment plan to the Attorney General for preclearance with a request for expedited consideration. The State would also then be able to request a declaratory judgment from the District of Columbia district court in a concrete factual context. There is, as the district court pointed out (J.S. App. 21a), no reason "to assume that administrative or judicial pre-

clearance will prove so unwieldy as to deny [appellant] a meaningful opportunity to expeditiously implement its statutory scheme."

Appellant suggests that it would suffer hardship from postponed resolution of the issue of coverage because it might be prevented from acting promptly in cases of educational emergency. See App. Br. 36-37; see also Amici Br. 13-16. The United States is not unaware of the States' need to be able to act promptly when local school districts are in trouble. Concern for the voting rights of minorities and for accountability in education are not mutually exclusive. When implementation of a statute such as Texas's Chapter 39 is submitted with all the necessary and relevant information, administrative preclearance can be accomplished expeditiously. See, *e.g.*, *Dobbs* v. *Crew*, No. CV-96-3240 (CPS) *et al.*, 1996 WL 497060 (E.D.N.Y. Aug. 23, 1996) (three-judge court). In *Dobbs*, state legislation in 1974 and 1996 had authorized the New York City Schools Chancellor temporarily to suspend local school boards under specified circumstances. Both enactments had been submitted to and precleared by the Attorney General as enabling legislation with the caveat that individual implementations would need to be precleared as well. *Id.* at *3.[11] In June 1996, Chancellor Crew exercised his authority under the amended statute with respect to three Community School Boards and sought expedited preclearance. He received a letter of no objection in approximately 22 days. *Id.* at *3-*4. The

[11] Under New York law, the Chancellor may continue the "suppression" or "suspension" of a local elected community board for up to one year, and may institute a new board at the end of that time. 1996 WL 497060, at *3 n.6.

Section 5 component of a private suit to enjoin those changes was then declared moot. *Id.* at *4. In short, preclearance need not entail undue delay.

Appellant also contends (Br. 39) that postponing a decision on the merits will cause it harm because of the burden on state sovereignty effected by the requirement of preclearance under Section 5. That contention, however, amounts to little more than a disagreement with Section 5 itself. Section 5 does place some restrictions on the ability of covered jurisdictions to reorganize their governmental structures. When the change affects voting, it cannot be implemented until preclearance has been sought and obtained, and that restriction applies to changes in voting for educational authorities no less than to other aspects of state and local governance. But, as the Court made clear long ago, "[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil [of race discrimination] to its victims." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); see also *City of Rome* v. *United States*, 446 U.S. 156, 172-183 (1980). The process of preclearance required by Congress imposes some burdens on state sovereignty, but the judgment that a short delay in the implementation of state voting changes is necessary to effectuate the guarantees of the Fifteenth Amendment was for Congress to make. And the hardship suggested by the State is really nothing more than the uncertainty of the eventual outcome of the preclearance process. As the district court observed, this allegation of a grievance "is so vague that it 'really amounts only to a complaint that this issue remains unresolved.'" J.S. App. 21a.

Nor is this a case like *Abbott Laboratories*, where the agency issued a regulation that had an immediately binding effect on private parties. Even though the agency was not in a position to enforce the order or regulation immediately, the Court emphasized that the order was "made effective upon publication, and * * * that compliance was expected." *Abbott Laboratories*, 387 U.S. at 151; see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (ripe controversy exists when agency issues "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately"). The Assistant Attorney General's December 11, 1995, letter to appellant, taking the position that preclearance is required for individual implementations of sanctions under Section 39.131(a)(7) and (8), did not require appellant to adjust its primary conduct. No "advance action" was required of appellant, and the impact of the letter (which merely restates the preexisting statutory requirement of preclearance) cannot be said to be felt immediately in appellant's "day-to-day affairs." See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. at 164; cf. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967) (finding case ripe because challenged regulations "are self-executing, and have an immediate and substantial impact upon the respondents").

Indeed, a concern for ripeness is reflected in the very structure of Section 5 and in the Attorney General's regulations. Section 5 applies when a jurisdiction either "enacts" or "seeks to administer" a voting change. When an authorizing statute vests discretion in a state official, the Attorney General may be able to preclear the "enactment," but she cannot predict how the official having discretion will ultimately "seek to administer" that enactment. The Attorney General

cannot, and the district court should not, give a covered jurisdiction *carte blanche* by assuming that specific actions pursuant to the authorizing statute, not yet identified or described, will not affect voting, or will not have either a discriminatory purpose or retrogressive effect. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (separate preclearance required for change in qualifying period for an election even though general underlying statute had already been precleared); compare *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991) (changes to be precleared must be identified with specificity). The Attorney General's procedures requiring the preclearance of specific implementations of a general authorizing statute, 28 C.F.R. 51.15, also reflects a ripeness concern that changes should be submitted for preclearance in a concrete context.[12] The Attorney General correctly relied upon that provision, and the district court correctly invoked the same principle in its constitutional and prudential manifestations when it decided to stay its hand until it was presented with a ripe case or controversy.

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[12] Section 51.15(a) provides:

> With respect to legislation (1) that enables or permits the State * * * to institute a voting change or (2) that requires or enables the State * * * to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

C. The State Sanctions' Alleged Conformity With Federal Education Statutes Does Not Create A Ripe Controversy

Finally, appellant contends (Br. 32-37) that the sanctions in question need not be precleared because they are consistent with federal statutes requiring recipients of federal financial assistance to have in place methods to impose sanctions on school districts that fail to show improved performance, and providing those recipients with flexibility in choosing their sanctions. That contention provides no basis for overturning the district court's ripeness ruling.

Whether state sanctions are consistent with the provisions of federal law on which appellant relies is, arguably, a purely legal question, and therefore there may be fewer prudential concerns militating against a decision whether those provisions of federal law pretermit the requirement of preclearance imposed by Section 5. Nonetheless, the irreducible Article III requirement of a live controversy is still absent, for the reasons we have explained (pp. 25-30, *supra*); in particular, appellant has demonstrated no concrete plan to impose the relevant sanctions on any school district. That part of appellant's case presents a purely legal question in the abstract does nothing to provide concreteness to the controversy. And, as we have explained (pp. 35-39, *supra*), appellant would suffer no hardship from a postponement of the controversy until it actually seeks to implement sanctions on a local school district.

Furthermore, appellant's reliance on the federal education statutes is unavailing anyway. In *Young* v. *Fordice*, 117 S. Ct. 1228, 1235-1236 (1997), this Court reaffirmed that even changes in state law relating to voting that are enacted to conform to federal statutory requirements require preclearance under Section 5. When the federal law leaves matters of implementation to the State's discretion, "[i]t is the discretionary elements of the new federal system that the State must preclear." *Id.* at 1239. Appellant does not suggest that the precise details of any appointment of a master or management team under Section 39.131(a) (7) and (8) are prescribed by federal law; rather they are, plainly, left to the State's discretion. Thus, *Young* v. *Fordice* makes clear that the federal education statutes relied on by appellant are irrelevant to this case. As to the central issue in the case—whether the appointment of and conferral of authority on a master or management team requires preclearance—there remains no live controversy.[13]

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[13] There are at least two further difficulties with appellant's reliance on federal education statutes, especially the statute authorizing the so-called "Ed-Flex" program permitting the Secretary of Education to waive certain requirements arising under federal statutes providing financial assistance to local education programs, 20 U.S.C. 5891. First, the Secretary of Education has concluded that Ed-Flex "does not, in any way, modify the State's obligations with respect to civil rights." J.S. App. 40a. Second, on July 25, 1997, the Department of Education advised the Texas Commissioner of Education that Ed-Flex does not authorize waivers of requirements that are applicable to *state* education agencies, but rather applies "only to waivers of requirements applicable to [local education agencies] or schools." App., *infra*, 2a. Accordingly, the Ed-Flex statute provides no basis for a conclusion that the imposition of sanctions on local school districts is exempt from Section 5.

III. SHOULD THE COURT CONCLUDE THAT SUBJECT-MATTER JURISDICTION AND A RIPE CONTROVERSY ARE PRESENT, IT SHOULD REMAND FOR FURTHER PROCEEDINGS ON THE MERITS

Should the Court conclude, contrary to our submissions, that the district court had subject-matter jurisdiction over this case and that a ripe controversy is present, it should remand the matter for further proceedings in the district court, rather than decide in the first instance the questions of coverage under Section 5 raised by appellant's brief. As we have explained, whether applications of the sanctions under Chapter 39 are covered by Section 5 may turn on the specific powers granted by the Commissioner of Education to a master or management team and the specific powers withdrawn from a local school board. Only when the extent of the intervention by the Commissioner is made clear will the courts be able to make a fully informed decision as to whether there would be a "*de facto* replacement of an elective office with an appointive one," *Presley*, 502 U.S. at 508, such that preclearance under Section 5 would be required. There has been no development of the record on that question, and discovery may be necessary for a proper presentation of the matter to the district court.[14]

The district court also made no findings of fact or conclusions of law on the question of coverage. This Court ordinarily does not decide in the first instance

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[14] Thus, contrary to appellant's suggestion that this Court decide the merits of the coverage question in the first instance, this is not a case in which "[t]he record is adequate to enable [the Court] to decide whether the challenged changes should have been submitted for approval" (App. Br. 18 n.22).

matters that have not been addressed at all in the lower courts. See *Clark*, 500 U.S. at 659-660; *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812-813 (1985). Moreover, the State did not raise the issue of coverage of Section 5 as a question presented in its jurisdictional statement. See J.S. i. Nor is the question of coverage "fairly included" within the questions that were presented by the jurisdictional statement, *viz.*, the district court's statutory jurisdiction and the ripeness of the controversy. This Court therefore should not reach the substantive issue of coverage. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); Sup. Ct. R. 18.3 (incorporating, for jurisdictional statements, requirements for certiorari petitions). Should this Court reverse the district court's ripeness ruling, it should remand the case to the district court to address the question of coverage in the first instance. Cf. *Abbott Laboratories*, 387 U.S. at 156 (after finding that review was not precluded and that case was ripe, remanding for proceedings on the merits).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 1997

APPENDIX

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

Jul. 25, 1997

Honorable Michael A. Moses
Commissioner of Education
Texas Education Agency
William B. Travis Building
1701 North Congress Avenue
Austin, TX 78701-1494

Dear Commissioner Mike Moses:

This is in response to your May 19, 1997 letter to Tom Fagan, Director of Goals 2000, concerning two proposed modifications in the way the Texas Education Agency (TEA) exercises its Ed-Flex authority. As Chairperson of the Department's Waiver Action Board, I have been asked to respond to your proposals.

The state proposes to require evaluation reports only from districts that do not meet performance objectives established by the Commissioner of Education in granting waivers. In light of the sound state accountability system and the required campus and district improvement plans tied to measurable performance objectives, we have no objection to this proposed modification. I understand that data already available at the TEA will be used to monitor the progress of all waiver recipients in meeting their

performance objectives, and that it may be duplicative to require districts that are meeting or exceeding their objectives to resubmit this data as part of a separate Ed-Flex evaluation report.

Texas has also requested the authority to approve waivers of provisions applicable to the state educational agency (SEA), in addition to approving waivers on a statewide basis of provisions applicable to eligible districts and campuses. We are unable to grant this request for several reasons. First, it is unclear whether Congress intended that the Ed-Flex authority be extended to include waivers of requirements applicable to an SEA. Although the general provision authorizing Ed-Flex (Section 311(e)(2)(A) of the Goals 2000: Educate America Act) does reference requirements applicable to SEAs, the specific statutory provisions governing the submission of Ed-Flex plans to the Department and the actual implementation of Ed-Flex authority by states refer only to waivers of requirements applicable to LEAs or schools.

Furthermore, it does not seem appropriate for the Secretary to delegate to states the authority to grant waivers of requirements applicable to SEAs. In every other instance where waivers are granted, a separate entity determines the appropriateness of the waiver. If an SEA were permitted to grant a waiver to itself, there may not be adequate independent safeguards for evaluating the permissibility of reasonableness of a waiver.

This decision concerning the scope of Ed-Flex authority should in no way impede a state's education reform initiatives. An Ed-Flex state, like any other

state, may request that the Department waive particular SEA-level requirements that are barriers to the implementation of state or local reform plans. We will act on these waiver requests as expeditiously as possible.

I appreciate the opportunity to respond to proposals and applaud your efforts in improving education for all students in Texas.

Should you have any question concerning these matters, do not hesitate to contact me at (202) 401-0113.

Sincerely,

/s/ GERALD N. TIROZZI
GERALD N. TIROZZI